93-399

NO.

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In the Supreme Court of the United States

October Term, 1992

BETTY ANN FERGUSON,
Petitioner

VERSUS

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ORIGINAL PETITION FOR WRIT OF CERTIORARI AND APPENDIX

Betty Ann Ferguson
In Proper Person
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Dated: September 9, 1993

QUESTIONS PRESENTED FOR REVIEW

I. Was Ferguson denied her Fifth Amendment rights when Respondent deliberately misrepresented to the court that Ferguson was not under criminal investigation in order for the court to compel admissions from Ferguson over her properly made individual Fifth Amendment objections, and to also twice deny Ferguson's motion for ex parte in camera hearing, with last Judge speculating there was little likelihood of criminal prosecution?

II. Was Ferguson denied due process when the lower courts refused to correct or provide relief from the Commissioner's egregious behavior, or to sanction the Commissioner for it: (1) after the Commissioner, in discovery, falsely denied the existence of records, used altered documents, gave conflicting answers to the same questions, refused to

answer many questions, and not providing answers ordered by the court; all designed to prevent Ferguson from obtaining the evidence needed to prove criminal investigation and invidious prosecution, and prosecute her case; (2) after Respondent, in pretrial conferences admitted to knowingly using false information from two informants against Ferguson and her spouse, and while admitting that he also expected said informants to give false testimony in Court, he threatened to use them as witnesses in court against Ferguson if she did not sign his stipulations which she protested were not true or correct; (3) after the Commissioner admitted to deliberately ommitting exemptions known to him in the Notices of deficiency, and in other documents?

III. Was Ferguson denied due process when the lower courts denied her request

to enforce the Public Protection provision of the Paperwork Reduction Act against the Commissioner and instead, enforced penalties assessed against her by the Commissioner, when the paperwork and recordkeeping rules and regulations, and the instructions, pertaining to the filling out and filing of major tax returns (such as the Form 1040) did not bear OMB control numbers for the years 1981-1985, at issue herein?

IV. Was Ferguson denied due process and equal protection under the law when the lower courts ignored the mandatory authority and controlling precedent of this Court, and judicially legislated an exemption from the Paperwork Reduction Act for the Internal Revenue Service - a federal agency which Congress stated emphatically was not to be exempted from this statute - while other courts, including this Court, have been enforcing

the same statute equally against other federal agencies?

V. Are the Internal Revenue Service paperwork regulations and information gathering rules which dictate that a person maintain information for the agency or provide information to the agency, including the regulations requiring the filling out and filing of federal income tax returns, "information collection requests" or "collections of information" subject to the Paperwork Reduction Act and its Public Protection provision?

VI. Does an IRS guide for the reporting of information, or instruction affecting the content, preparation, return, or use of a report form such as the Instructions for the Form 1040 come under the Paperwork Reduction Act and its Public Protection provision?

LISTING OF ALL PARTIES

The names of all parties to this proceeding appear in the caption of the case; namely, Betty Ann Ferguson and the Commissioner of Internal Revenue.

NOTE: Ferguson apologizes for the awkward questions, but Ferguson is not an attorney, and has been told that "if you do not ask it, the Court cannot address it;" therefore please forgive the style, as she struggles to concentrate on substance.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Betty Ann Ferguson (herein "Ferguson"), hereby petitions this Court for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Court of Appeals' opinion affirming the decision of the United States Tax Court was entered on June 11, 1993, and was not published; see Ferguson v. Commissioner, Doc. No. 92-4884, __ F.2d __ (5th Cir. 1993). Petition for rehearing was timely filed, but was denied on July 14, 1993. The unpublished opinion of the Court of Appeals appears in the Appendix hereto at A-1. The order on rehearing appears in the Appendix hereto at A-19.

The decision of the United States

Tax Court, entered May 26, 1992, from which appeal was taken to the Court of Appeals, and the memorandum opinion filed February 18, 1992, see Ferguson v. Commissioner, T.C. Memo. 1992-95, appear in the Appendix hereto at A-10 and A-11.

STATEMENT OF JURISDICTION

The judgement sought to be reviewed by this petition was entered in the United States Court of Appeals for the Fifth Circuit on June 11, 1993, and the order denying a rehearing was entered on July 14, 1993. The jurisdiction of this Court to grant certiorari and review this judgement is established pursuant to 28 U.S.C. Section 1254(1); and Rule 10.1(a) and Rule 10.1(c) of the Supreme Court Rules.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS IN THIS CASE

The Constitution of the United States

Art. III, § 2.

"The judicial Power shall extend to all Cases, ... arising under this Constitution, the Laws of the United States, ... - to Controversies to which the United States shall be a Party; ....

... In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The BILL OF RIGHTS
Preamble.

"[I]n order to prevent misconstruction or abuse of its [Constitution] powers, ... And as extending the ground of public confidence in the Government,...."

Amend. V.

"No person shall ... be compelled ... to be a witness against himself, ... nor be deprived of life, liberty or property, without due process of law ...."

26 U.S.C. § 6091 Place For Filing Returns or Other Documents

"(a) General Rule.--When not otherwise provided for by this title, the Secretary shall by regulations prescribe the place for the filing of any return, declaration, statement, or other document, or copies thereof, required by this title or by regulations.

(b) Tax Returns.-- In the case of returns of tax required under authority of part II of this subchapter--

(1) Persons Other Than Corporations.--

(A) General Rule--Except as provided in subparagraph (B), a return (other than a corporation return) shall be made to the Secretary--

(i) in the internal revenue district in which is located the legal residence or principal place of business of the person making the return, or

(ii) at a service center serving

the internal revenue district referred to in clause (i), as the Secretary may by regulations designate."

26 U.S.C. § 7805 Rules and Regulations

"(a) Authorization.- ...[T]he Secretary shall prescribe all needful rules and regulations for the enforcement of this title,..."

44 U.S.C. § 3501. Purpose

"The purpose of this chapter is--

(1) to minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons;

(4) to coordinate, integrate and, to the extent practicable and appropriate, make uniform Federal information policies and practices;

(5) to ensure that ... information technologies are ... used by the Federal Government in a manner which ... reduces the information processing burden for the

Federal Government and for persons who provide information to and for the Federal Government;"

44 U.S.C. § 3502. Definitions

"(4) the term "collection of information" means the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either--

(A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or..."

"(11) the term "information collection request" means a written report form, application form, schedule, questionnaire, reporting or recordkeeping

requirement, collection of information requirement, or other similar method calling for the collection of information;"

44 U.S.C. § 3504. Authority and functions of Director

"(c) The information collection request clearance and other paperwork control functions of the Director shall include--

(1) reviewing and approving information collection requests proposed by agencies;

(2) determining whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency;

(3) ensuring that all information collection requests--

(A) ...display a control number and, when appropriate, an expiration date;

(B) indicate the request is in

accordance with the clearance requirements of section 3507; and

(C) contain a statement to inform the person receiving the request why the in formation is being collected, how it is to be used, and whether responses to the request are voluntary, required to obtain a benefit, or mandatory;"

44 U.S.C. § 3507 Public information collection activities

"(f) An agency shall not engage in a collection of information without obtaining from the Director a control number to be displayed upon the information collection request."

44 U.S.C. § 3512 Public protection

"Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and

does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter."

44 U.S.C. § 3516 Rules and regulations

"The Director shall promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter."

44 U.S.C. § 3518 Effect on existing laws and regulations

"(a) Except as otherwise provided in this chapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities is subject to the authority conferred on the Director by this chapter."

5 C.F.R. § 1320.2 Effect:

"This part supersedes and rescinds Circular No. A-40, Revised, dated May 3, 1973, and Transmittal Memorandum No. 1, dated February 20, 1976. This Part will

become effective on May 2, 1983."

5 C.F.R. § 1320.5 Public Protection

"(a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failure to comply with any information collection request if the request does not display a currently valid OMB control number, or, in the case of an information collection request which is submitted to nine or fewer persons, the request fails to state that for this reason it is not subject to OMB review under the Act."

"(d) Whenever a member of the public is protected from imposition of a penalty under this section for failure to comply with a collection of information, such penalty may not be imposed by an agency directly, by an agency through judicial process, or by any other person through judicial or administrative process."

5 C.F.R. § 1320.7 Definitions

"(c) "Collection of information" means the obtaining or soliciting of information by an agency from ten or more persons by means of identical questions, whether such collection of information is mandatory, voluntary, or required to obtain a benefit. For purposes of this definition, the "obtaining or soliciting of information" includes any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information. "Collections of information" are of two mutually exclusive types: "collection of information requirements" and "information collection requests."

(1) A "collection of information" includes the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other

similar methods. Similar methods may include ... rules or regulations, planning requirements, circulars, directives, instructions, ... disclosure requirements ... telephonic requests, and standard questionnaires used to monitor compliance with agency requirements.

"(f) "Display" means:

(1) In the case of forms, questionnaires, instructions, and other written information collection requests individually distributed to potential respondents, to print the OMB control number (and unless OMB determines it to be inappropriate, the expiration date) in the upper right hand corner of the front page of the request;

(2) In the case of collections of information published in regulations, guidelines, and other issuances in the FEDERAL REGISTER to publish the OMB control number in the FEDERAL REGISTER

(as part of the regulatory text or as a technical amendment) and insure that it will be included in the Code of Federal Regulations if the issuance is also included therein:

"(1) "Information collection request" means the method by which an agency communicates the specifications for a collection of information to potential respondents, including a written report form, application form , schedule, questionnaire, oral communication, reporting or recordkeeping requirement, or other similar method;

26 C.F.R. § 1.6091-2

"Except as provided in [section]1.6091-3 (relating to income tax returns required to be filed with the Director of International Operations) and [section] 1.6091-4 (relating to exceptional cases)-

(a) Individuals, estates, and trusts.-

(1) Except as provided in paragraph (c)

of this section, income tax returns of individuals,...shall be filed with the district director for the internal revenue district in which is located the legal residence or principle place of business of the person required to make the return, or, if such person has no legal residence or principle place of business in any internal revenue district, with the District Director at Baltimore, Maryland 21202. ....

(c) Returns filed with service centers.- Notwithstanding paragraphs (a) and (b) of this section, whenever instructions applicable to income tax returns provide that the returns be filed with a service center, the returns must be so filed in accordance with the instructions."

OMB Circular No. A-40, Revised, dated May 3, 1973 [superseded by 5 C.F.R. § 1320 effective on May 2, 1983.]

"1. Purpose. This Circular establishes policy and promulgates regulations to

assure continuing effective management of Federal reporting requirements in the executive branch."

"3. Coverage and definitions. The provisions of this Circular apply to the management of all Federal reporting requirements as defined in this paragraph and in Attachment A.

"4. Authority. The policy and regulations provided herein are promulgated under the authorities in the Federal Reports Act of 1942 (44 U.S.C. 3501-3511); section 104 of the Act of September 12, 1950 (31 U.S.C. 18a); and that section of the Federal Records Act of 1950 codified in 44 U.S.C. 3102.

ATTACHMENT A, Circular No. A-40

"1. The following definitions for public reporting are to be used for the purpose of this Circular.

d. "Plan." Any specific requirement or guide for the reporting of information or

the establishment or maintenance of records ... which are to be used or be available for use in the collection of information; any such requirement or instruction affecting the content, preparation, return, or use of a plan or report form; or any contract or agreement which will result in the collection of information on identical items from 10 or more respondents.

INTERNAL REVENUE MANUAL - Correspondence "35(44)1.6
Paperwork Reduction Act of 1980

(1) Public Law 96-511, "Paperwork Reduction Act of 1980," requires that public use forms and documents must be submitted to the Office of Management and Budget (OMB) for approval before the form or document may be issued.

(b) Upon approval, OMB assigns an OMB Number and Expiration Date to each item.

(c) Major tax forms which carry a tax year printed on the form are not required

to have the Expiration Date assigned by the OMB printed on the form. Document Perfection Requests are not required to have an Expiration Date.

(d) Effective 1/1/82, the OMB Number and Expiration Date must be on the item.

(3) The items which carry OMB information can be classified into two categories as follows:

(a) Information Collection Requests (ICRs)--An ICR us a form (letter, notice, etc.) which is used to request information from ten or more taxpayers, whether mandatory or voluntary, necessary to carry out the Internal Revenue laws of the United States. Each ICR is assigned a unique OMB Number. ICRs include, but are not limited to:

1 major tax forms and instructions;

2 public use forms ....

(4) The OMB Number and Expiration Date, when required, must be typed or computer

generated on ICRs.

(7) OMB requires that the OMB Number and Expiration Date, when required, appear in the upper right corner of the document.

(8) In addition to the OMB Number for DPRs, and the OMB Number and Expiration Date for ICRs, each document must be accompanied by the appropriate Paperwork Reduction Act Notice, Notices 609-612 ...

(b) The Notice will be included as a part of each tax return or instruction package.

Internal Revenue Manual - Regulations Drafting Handbook - Office of Chief Counsel

"338.2 Paperwork Reduction Act

(1) If the regulations or proposed regulations include a provision that requires taxpayers to keep records or to report information to the IRS, the Paperwork Reduction Act requires that the regulations be approved by the Office of Management and Budget (OMB) before they

may be promulgated as final or temporary regulations. ..."

IR MANUAL - INTERNAL AUDIT HANDBOOK

167.4 Office of Management and Budget (OMB) Clearance of Confirmation Programs

"(1) The Paperwork Reduction Act of 1980 requires all government agencies to obtain OMB approval for all Information Collection Requests (ICRs). An ICR is any requirement to record, maintain, provide or report information. This includes any form, notice, letter, stuffer, questionnaire, survey, manual instruction, recordkeeping requirement or other oral or written means by which identical requests of information are made from 10 or more persons, whether the response is voluntary or mandatory.

(2) An OMB clearance number and expiration date are used to identify all ICRs subject to the Paperwork Reduction Act that are cleared by OMB. Starting

January 1, 1982, all ICRs must include the clearance number and expiration date. If using confirmation letters, this information is to be printed on the face of the ICR in its upper right hand corner .... If telephone interviews are used, the taxpayer must be provided this information. The clearance number and expiration date assigned to Internal Audit's Confirmation Program are ...."

STATEMENT OF THE CASE

Ferguson is not an attorney, and is appearing pro se because she cannot afford to hire counsel, even to assist her. Ferguson respectfully requests that this Court be mindful of her woefully inadequate legal knowledge and skills while considering her petition for writ, both in form and content.

Ferguson shall try, in good faith and to the best of her abilities, to present the points requiring consideration with accuracy, brevity, and clearness, in accordance with Supreme Court Rule 14.5., but as this Court has recognized in the past, Ferguson should not be held to the same standards as a lawyer. See Haines v. Kerner, 404 U.S. 519, **reh'g denied**, 405 U.S. 98 (1972). Ferguson's ignorance of what she must express and how, has already been very costly in the lower courts. Ferguson also advises the Court

that she has waived no rights at any time, nor will she; not even in ignorance.

After Respondent issued statutory notices of deficiency for federal income taxes to Ferguson covering the years 1981 through 1985, Ferguson filed a timely petition with the Tax Court, in March, 1989, pursuant to 26 U.S.C. § 6213. The case was called on March 14, 1990. The Court ruled against Ferguson for lack of prosecution because she would not violate her religious beliefs and swear or affirm by the stringent manner insisted on by the Court. The Court entered its ORDER OF DISMISSAL AND DECISION on March 20, 1990, which decision for Respondent included all penalties assessed. Ferguson appealed to the Fifth Circuit on August 3, 1990, and Fifth Circuit rendered its decision of Reverse and Remand on January 22, 1991.

Calendar call on remand was October 28, 1991; there was a motion hearing on October 31, 1991; and trial was November 4, 1991. The Court issued a Memorandum Opinion on February 18, 1992, under Rule 155, in Respondent's favor, and rendered its final Decision and Order on May 26, 1992.

Ferguson filed a timely Notice of Appeal with the Fifth Circuit on August 14, 1992. Fifth Circuit issued its Judgement and unpublished Opinion affirming the decision of the Tax Court on June 11, 1993. Because the opinion was in direct conflict with a prior and controlling decision of the Supreme Court, on June 25, 1993, Ferguson filed a Suggestion For Rehearing En Banc. On July 14, 1993, treating the Suggestion For Rehearing En Banc as a petition for panel rehearing, the panel denied the suggestion without a poll of the Court.

Now Ferguson has filed this timely petition for a Writ of Certiorari with the Supreme Court.

Respondent reluctantly admitted in September and October, 1991, in Admissions (Docs. 35 & 37, Nos. 32-34.), and in Court (Transcript of 10-31-91, pgs. 23-28; Transcript of 11-04-91, pgs.4-6.), that (1) there had been criminal investigation of Ferguson, and at least three of the five years at issue had been referred to the Criminal Investigation department [hereinafter CID]; and (2) Respondent did believe Ferguson to be engaged in illegal activities and still believes it. Respondent admitted 1981-1983 had been referred to CID only after Ferguson had already shown proof. Respondent denies knowledge about the more recent two years because the more recent records are "missing."

Ferguson had maintained all along that Respondent was engaged in discriminatory prosecution with hidden criminal investigation. Respondent has steadfastly and deliberately misrepresented to the Courts that there was not and never had been any criminal investigation of Ferguson, until after remand when Ferguson was able to produce some IRS documents proving criminal investigation.

The facts crucial to this case actually began when Respondent began criminal investigation of Ferguson in late 1980 or very early 1981, before a 1980 return was even due -certainly well before returns for the years at issue (1981-1985) might be due. Respondent has tried to cover his actions with the blanket of "illegal tax protester," because Respondent knows the courts have ruled in cases regarding individuals that

respondent has arbitrarily determined to be "tax protestors," that the constitutional rights of those individuals have not been violated or abridged by the subsequent actions of respondent. Ferguson strongly believes that, in her individual case, the admitted arbitrary determination by de facto conviction that Ferguson is an "illegal tax protestor," was a screen to hide some other reason (still unknown to her), for the egregious, unethical and unlawful behavior of Respondent towards Ferguson.

DENIAL OF RIGHTS UNDER FIFTH AMENDMENT

The subsequent actions taken by respondent have certainly abridged the Constitutionally-protected rights of Ferguson.

Respondent's egregious behavior caused the court prior to remand to deny Ferguson's motion for an ex parte in

camera hearing prior to trial and to compel her to answer admissions over her properly invoked individual Fifth Amendment objections.

After remand, after Ferguson had produced documents proving there had been criminal investigation, and Respondent admitted it, also admitting to believing Ferguson to be engaged in "illegal criminal" acts, the Court again denied Ferguson's motion for an ex parte in camera hearing prior to trial after the Judge and Respondent decided and predicted there was not much likelihood of Ferguson being prosecuted.

Respondent has admitted to using information from informants against Ferguson and her spouse when Respondent knew the information was false when he decided to use. Respondent also said that he expected these witnesses to lie on the stand in court if he called them

against Ferguson, and threatened to use these informants as witnesses in court against Ferguson if she would not stipulate to something she believed to be wrong.

Respondent has admitted (App.Rec.Doc. Nos. 35 & 37), to arbitrarily determining Ferguson to be an "illegal tax protestor" in a de facto conviction without Ferguson's knowledge or a chance to defend herself, and has admitted to using "assumption" and "guilt by association" in his conviction process, all unacceptable in real due process. Respondent has also admitted that an "illegal tax protestor" is automatically denied certain administrative procedures and remedies available to those without this designation; certain procedures are automatically accelerated; and there are other differences in the "handling" of

this classification of people which respondent will not disclose.

Respondent admitted that the IRS "does sometimes handle non-tax protestors in the same manner in which it handles petitioner." In response to Admissions, Respondent authenticated an IRS document which identified the non-tax protestor persons who are grouped with illegal tax protestors for this "special" treatment as: persons involved with drugs, tax shelter promoters, and organized crime figures.

Basically, Respondent has admitted that Ferguson was convicted of doing something illegal, in a secret administrative hearing or process, without notification or a chance to face her accusers and defend herself, and then discriminated against because she was arbitrarily made a part of a special classification of people -- all without

basic due process, and certainly a denial of substantive due process. For an agency of the Federal government to officially categorize Ferguson as an "illegal tax protestor" in such an action is not only an infringement of Ferguson's personal First Amendment freedoms of speech, thought, and association, but it also constitutes an impermissible presumption of criminal intent and criminal action. If a government agency is allowed to **create** classifications of individuals through an arbitrary and unlawful process, and then decide that the guarantees and protections of the Constitution do not apply to these artificially created classes, all without due process, then the Constitution of the United States, from which all federal government derives its authority, and more importantly, the limits to its authority, is a total sham and a mockery.

What is even more shocking and tragic is the judicial participation in upholding such behavior.

Ferguson became aware of the criminal investigation early on, and while she did not believe she had committed any crime, Ferguson had read an interview of a former IRS employee who said there was not a return filed that an agent could not either find something wrong with, or change something on, if he wanted to "get" somebody. The Tax Court points out that "the Fifth Amendment privilege against self-incrimination does not justify a refusal to file Federal income tax returns" and that it "may be asserted only in response to specific questions asked on the returns." Ferguson has NEVER **refused** to file a return. Ferguson knew she was under criminal investigation, and did not refuse to file a return but sought only

to find out from respondent how to file one without giving up her rights to protect herself and her property.

Respondent's position in the notices of deficiency was that Ferguson had failed to file federal individual income tax returns for 1981 through 1985, so Respondent was authorized by law to assess both the taxes due for those years and "failure to file and pay" penalties sanctioned by the tax code. Ferguson's position regarding the penalties is that none of Respondent's penalties can stand under the Paperwork Reduction Act for the years 1981-1985.

PAPERWORK REDUCTION ACT AND THE INTERNAL REVENUE SERVICE

Ferguson asked the Tax Court to enforce 44 U.S.C. § 3512, the Public Protection provision of the Paperwork Reduction Act [hereinafter PRA] and its statutorially promulgated regulation, 5

C.F.R. § 1320.5, against Respondent because the paperwork and recordkeeping rules and regulations, and the instructions, pertaining to the filling out and filing of major tax returns (especially Forms 1040) are "information collection requests" under 44 U.S.C. § 3512 and 5 C.F.R. § 1320.5, and Ferguson cannot be subject to <u>any</u> penalty, for failure to file tax returns (such as Forms 1040) for 1981-1985, inclusive, the years at issue herein, because neither the said paperwork and recordkeeping rules and regulations, nor the said instructions for those years display an OMB control number as required by the PRA. [Pages 8 and 10.]

The Tax Court refused, and without subject matter jurisdiction over the penalties, judicially exempted Respondent from the PRA saying the "PRA does not apply to either Federal income tax

regulations or to the instructions accompanying Federal tax forms because such documents are not information requests" and awarded to Respondent all the penalties Respondent had unlawfully assessed in the notices of deficiency. See Appendix B.

Ferguson appealed, and Fifth Circuit, in direct contravention of the controlling precedent and mandatory authority of this Court, also judicially legislated an exemption from the Paperwork Reduction Act for the Internal Revenue Service, a federal agency which Congress stated specifically and emphatically was not to be exempted from this statute, and affirmed the decision of the Tax Court. [Appendix A.] This Court in Hallstrom v. Tillamook County, 110 S.Ct. 304, 309 (1989), recognized that "[W]e are not at liberty to create an exception where Congress has declined

to do so." Here, Congress did not just decline, but was adamant that there was not to be an exception for the IRS. Fifth Circuit acted without jurisdiction in a matter where Congress statutorially denied jurisdiction.

Ferguson asked the lower courts to grant her due process and equal protection under the law (United States Constitution, Fifth Amendment) by enforcing the public protection provision of the PRA because the courts have enforced it against various other federal agencies but not against the IRS, and the precedent-setting standards of review set forth by this Court in Dole v. Steelworkers of America, 494 U.S. 26, 110 S.Ct. 929 (1990), [hereinafter Dole] clearly indicate that the IRS rules, regulations and instructions concerning the filling out and filing of income tax returns are "information collection

requests" [ICRs] within the meaning of the provision and are therefore covered by the public protection provision.

This Court, in Dole, enunciated clear standards of review for deciding what is and what is not, an "information collection request" subject to the PRA, and therefore has direct application in this case and is not **dicta**. The Dole decision is mandatory authority, and is directly controlling over this case. Rodriguez de Quijas v. Shearson/Am. Exp., 490 U.S. 477, 484 (1989). While Dole may not address all parts of this case in explicit terms, it provides very clear guidance. There were no "instructions" per se before the Dole Court, but following the lead of the Court (see 110 S.Ct. at 933, N.3.) the Paperwork Reduction Act, P.L. 96-511, VII. Section-By-Section Analysis, Section 3502., U.S.Code Cong. & Admin.News 1980,

explained that OMB Circular No. A-40, Revised 5/03/73, and Attachment A, "Clearance of Public Reporting and Recordkeeping Requirements Under the Federal Reports Act," would be the governing regulations for the PRA until new ones could be promulgated. See 5 C.F.R. § 1320.2. (P. 9). Attachment A contains the following definition as 1.d. (pgs. 1-2) [P.15 this document.]

> "Plan." Any specific requirement **or guide** for the reporting of information ... or maintenance of records ... which are to be used or be available for use in the collection of information; any such requirement or **instruction affecting the content, preparation, return, or use of a** plan or **report form**; ... which will result in the collection of information on identical items from 10 or more respondents. (Emphasis added)

The instructions for the Form 1040 affect the **content, preparation, return** and **use** of the **report form**, "Form 1040," and are obviously a "plan." Then on page 3 of Attachment A is:

2. Clearance requirements.

a. General requirements of clearance. No plan or report form (whether repetitive or single-item) is to be used or prescribed by a Federal agency in the collection or recording of information from 10 or more persons without first obtaining clearance from [OMB] which will be indicated by inscribing thereon the OMB approval number or notation.

Under 5 C.F.R. § 1320.7(c)(1) in the definition of "collection of information," it specifically says "instructions" under "similar methods." (Page 11.) Notice also the term "similar methods" in 44 U.S.C. § 3502 (Page 6.)

At § 1320.7(f)(1):

> (f) "Display" means:
> (1) In the case of forms, ... **instructions**, and other written information collection requests ... to print the OMB control number ... in the upper right hand corner of the front page of the request;" (emphasis added.) (Page 12-13.)

Clearly, the instructions to the Form 1040 are also considered to be a "written information collection request" and must

display the OMB number in the manner prescribed by OMB regulations.

26 C.F.R. 1.6012-1(7) states that a Form 1040 may be filed only by those individuals entitled to use such form as provided by and in accordance with the **instructions** for such form.

Internal Revenue Manuals (See appropriate sections on pages 16-20) contain the following party admissions (government manuals admissible as party admissions under Fed.R.Evid. 801(d)(2)(D)) regarding the PRA:

1. The PRA **requires all government agencies** to obtain OMB approval for **all** Information Collection Requests (ICRs).

2. ICRs include the **instructions** for major tax forms.

3. **Regulations** which include a provision that requires individuals to keep records or to report information to the IRS **require** OMB approval and **display** of OMB number.

4. An ICR used to request information, **whether mandatory or voluntary**, necessary to carry out the Internal Revenue **laws** of the

> United States **must** be approved by OMB and **display the OMB number**, effective **1/1/82**.

This proves that Respondent, under color of law, with unclean hands and an institutional posture of bad faith, unlawfully used both administrative and judicial processes to demand **penalties** in excess of $68,000.00 (thus far) from Ferguson for the years 1981-1985, inclusive, in violation of a statute which specifically prohibits these actions; actions which, according to Respondent's own admissions and regulations, Respondent knew were statutorially prohibited. The agency's failure to follow its own regulations has risen to the level of a due process violation (See Morton v. Ruiz, 415 U.S. 199, 235, (1974)). Respondent has demanded sums greater than allowed by law. (26 U.S.C.§ 7214.) The lower courts have denied Ferguson due process by

granting Respondent's unlawful demands for these penalties instead of enforcing the PRA and denying these demands, and sanctioning Respondent for making demands Respondent knew to be unlawful.

Respondent told Fifth Circuit "Taxpayer's arguments are without merit. ... the IRS regulations requiring the filing of federal income tax returns do ... display OMB control numbers, contrary to taxpayer's assertions. ... **published** at 50 Fed. Reg. 10222, **March 14, 1985** ...." (Appellee Br.29)(Emphasis added.) The years at issue herein are **1981-1985**, inclusive, and all information collection requests after **December 31, 1981**, which do not display a current OMB number are covered by the public protection provision of the PRA. The instructions for the Forms 1040 did not display an OMB control number during the years at issue, 1981-1985, and still display no such OMB

number. Also, many court decisions say 26 U.S.C. § 6091 and its implementing regulations govern the duty to file a tax return. 26 C.F.R. 1.6091-1, 1.6091-2, and 1.6091-4 still have no OMB numbers even now, and 1.6091-2 certainly qualifies as an "ICR." Its "parent" statute, 26 U.S.C. § 6091, is, by its language, dependent upon regulations for its implementation. The regulation itself calls for providing a document of standardized questions directly to an agency. [Pages 4 and 13.]

This Court, in Dole, decided that the terms "information collection request," and "collection of information," refer solely to the collection of information by, or for the use of, a federal agency, (110 S.Ct. at 934.); that Congress used the word "solicit" in addition to "obtain" in order to cover information requests that

rely on the voluntary cooperation of information suppliers as well as rules which make compliance mandatory, and that "obtaining or soliciting facts by an agency" referred to an agency's efforts to gather facts for its own use (110 S.Ct. at 934); and that the phrase "reporting and recordkeeping requirement" would comprise only rules requiring information to be sent or made available to a federal agency. (110 S.Ct. at 935.)

The Court examined the problems Congress sought to solve, and the enumerated purposes of the PRA, and none seemed to fit third-party disclosure rules. 110 S.Ct. at 935-936. One of those noted referred to minimizing the time and effort expended by persons to provide information to a federal agency. The Commission on Federal Paperwork that Congress established in 1974 to study and report what changes should be made in

laws, regulations, and procedures to assure that necessary information was obtained by the government with minimal burden, duplication, and cost, (Commission of Federal Paperwork, Final Summary Report, (October 3, 19 77)) reported seven key causes of burdensome, unnecessary, or otherwise unacceptable paperwork, including incomprehensible government forms and instructions.(Id. at 605) The IRS was identified as one of the key offenders. The Commission said "...instructions are unnecessarily detailed and complex, and often are written at a reading comprehension level much higher than that of the average taxpayer ..." (Id. at 664.) One of the major recommendations was rewriting instructions so they are understandable. (Id. at 674.) The Commission stated:

> The regulations dealing with the individual income tax are not straight forward enough to be used by the average taxpayer to complete

> tax returns without any other guidance.
>
> Because neither the tax code nor the regulations provide the kind of information taxpayers need to report their tax obligations with relative ease, a third and fourth set of documents (instructions ... and plain-language publications) are issued .... (Id. at 793-794.)

The Commission recognized the instructions to forms, and tax pamphlets, as the agency's official interpretation and explanation of statutes and regulations. (Id. at 799.) Clearly, submission of the instructions for major tax forms such as the Form 1040 to OMB for clearance and approval (which statutorially includes necessity of proper display of OMB control number) is required to achieve minimizing the time and effort expended by persons to provide information to a federal agency. Another enumerated purpose was making uniform as much as possible federal information policies and practices. This cannot be

accomplished unless and until all federal agencies are forced to comply with the PRA.

This Court paid special notice to "the statute's mechanism for assuring agency compliance with its terms" referring to 44 U.S.C. § 3512, and decided that its clear legislative history showed that Congress intended the provision to apply to all collections of information subject to the PRA.

> However, this protection of the public is applicable only to information-gathering rules. Section 3512 provides that "no person shall be subject to any penalty for failing to maintain or provide information **to any agency** if the information collection request involved ... does not display a current control number assigned by the [OMB]...." **Ibid.** (emphasis added).
>
> While the grammar of this text can be faulted, its meaning is clear: the public is protected under the Paperwork Reduction Act from paperwork regulations not issued in compliance with the PRA, only when those regulations dictate that a person maintain information **for an agency** or provide information **to an**

agency. 110 S.Ct. at 937. (Emphasis is Court's).

The Court then affirmed that the PRA does not give OMB authority over agency rules mandating disclosure by regulated parties to third parties.

Earlier, the D.C. Circuit Court had ruled in Action Alliance V. Bowen, 846 F.2d 1449 (D.C. Cir. 1988), [hereinafter Action Alliance] that a regulation from Health and Human Services [hereinafter HHS] that required funding recipients to make a certain written report which was to be available to the agency upon request was subject to review under the Paperwork Reduction PRA as "collection of information" and "recordkeeping." This Court granted certiorari, vacated the judgement and remanded "for further consideration in light of Dole ...." which decision it had just rendered. (110 S.Ct. 1329 (1990)). (Does the Supreme Court remand "for further consideration

in light of [dicta]?) Action Alliance v. Sullivan, 930 F.2d 77 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 371 (1991) (Bowen had been succeeded by Sullivan as Secretary of HHS), ruled that the regulation in question was subject to review by OMB under the PRA as "collection of information" and "recordkeeping," notwithstanding that information was not directly collected by an agency, as requirement that information be available to agency upon request is sufficient to bring a data collection regulation under the PRA.

Prior to the Dole decision, the Ninth Circuit in United States v. Smith, 866 F.2d 1092 (9th Cir. 1989), [hereinafter Smith], reversed convictions based on the willful failure to comply with Department of Interior regulations lacking an OMB control number. In rejecting the Government's alleged

distinction between forms and instructions such as manuals, and regulations, the Smith court found that while the form which the Forest Service would have accepted as Smith's Plan did not have an OMB number and therefore did not satisfy the PRA, that Smith was prosecuted for failure to file a Plan pursuant to regulations; not failure to file the Applicaton.

> ... regulation requiring appellants to file the Plan of Operations is itself an [ICR] within the meaning of the PRA. If our answer ... is affirmative, we will then consider whether the PRA prohibits judgments of conviction entered against the appellants.

The Smith Court then examined the same definitions as this Court did later in Dole, and concluded that since the regulation required disclosure of information to the government through answers to standardized (identical) questions, the regulation was indeed an

information collection request under the PRA. The Court acknowledged that the regulation lacked a current OMB control number and stated:

> Consequently, PRA section 3512 by its terms prohibits the imposition of "any penalty" against the appellants, including criminal convictions, for their failure to comply with the Plan of Operations filing requirement. The statute explicitly and unambiguously provides that all information collection requests must display a current control number, or penalties for noncompliance may not be imposed. 44 U.S.C. Section 3512. [Footnotes omitted.]

Later, the Ninth Circuit heard another case involving a miner charged with failure to submit a "Plan." United States v. Hatch, 919 F.2d 1394 (9th Cir. 1990). Since the regulation at issue did not have an OMB control number, Ninth Circuit reversed the conviction holding that compliance with the PRA was a jurisdictional prerequisite to the imposition of criminal penalties.

The Tenth Circuit noted in U.S. v.

Collins, 920 F.2d 619, 630, n.12, (10th Cir. 1991), [hereinafter Collins] that Dole superseded its holding in U.S. v. Tedder, 787 F.2d 540, 542 (10th Cir. 1986). In Tedder, the Tenth Circuit held that tax forms were not information collection requests subject to the PRA because the filing of income tax returns was obligatory. Then, recognizing that the statutory scheme cannot be implemented without regulations, instructions or forms, the Collins Court stated:

> "We recognize that because defendant was charged with tax evasion and not failure to file tax returns, he technically was not being prosecuted for failure to provide information.... But because the provision of information in 1040 forms is inexorably linked to the statutory requirement to pay taxes, and defendant failed to file such forms, the Paperwork Reduction Act was applicable to such conduct." U.S. v. Collins, 920 F.2d 619, 630 n. 13 (10th Cir. 1991). (Emphasis added.)

(The issue actually raised by the

defendant was that the 1040 forms had OMB numbers but no expiration dates. The lack of OMB numbers on the instructions and regulations for the 1040 forms was not raised. The IRS has received a waiver for the expiration date on the Form 1040, but has not received a waiver for OMB numbers for the instructions and regulations.)

Further, at 920 F.2d, 630, n.12, Collins also observed that:

> Dole would also appear to call into question the holdings in Snyder V. IRS, 596 F.Supp. 240 (N.D.Ind.1984) and Cameron v. IRS, 593 F.Supp. 1540 (N.D.Ind. 1984), aff'd, 773 F.2d 126 (7th Cir. 1985), both of which held the [PRA] inapplicable to IRS forms.

This Court said in the past, on granting certiorari, that an appellate court that ignored the mandatory authority of this Court and intruded into the "province of legislatures" could be viewed as "having ignored, consciously or

unconsciously, the hierarchy of the federal court system created by the Constitution and Congress" but:

> [U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be. Hutto v. Davis, 454 U.S. 370, 374-375, (1982).

This Court has recently acknowledged again that "Adherence to precedent promotes stability, predictability, and respect for judicial authority" and is of special importance in the "area of statutory interpretation." Hilton v. South Carolina Public Railways Com'n. ___ U.S. ___, 112 S.Ct. 560, 564 (1991).

The number of lower courts that are ignoring the precedent of this Court in their rulings when asked to enforce the public protection provision of the PRA against the IRS is growing, along with the audacity of their reasoning for ignoring this Court. Regarding this

issue, a degree of anarchy already exists in the judiciary.

The Tax Court, Fifth Circuit and Respondent all ignored this Court's controlling decision, Dole, in this case, but they all cited United States v. Dawes, 951 F.2d 1189 (10th Cir. 1991) [hereinafter Dawes]. The Dawes decision is not only in direct conflict with this Court in Dole, but is impertinent enough to cite Dole several times and misrepresent Dole to mean the opposite of what Dole actually said. For example, the Dawes court reached the conclusion that "IRS rules" are "disclosure rules" and do not come under the PRA because:

> "The Supreme Court in Dole has noted that most items in the statutory definition are "forms for communicating information to the party requesting that information" and that the "`reporting and recordkeeping requirement' category is limited to `only rules requiring information to be sent or made available to a federal agency, [and] not disclosure rules.'" Dole, 110

> S.Ct. at 935." United States v. Dawes, 951 F.2d 1189, 1192 (10th Cir. 1991).

Respondent cites this quote from Dawes, apparently maintaining the same conclusion. Are Respondent and Dawes trying to say that the IRS is not a federal agency?

Dawes has further "misapplied" Dole, and also Action Alliance supra, in declaring the tax instructions and regulations to be "substantive policy," and indicating that the Dole and Action Alliance decisions support this.

> "See Dole, 110 S.Ct. at 933; Action Alliance of Senior Citizens v. Sullivan, 930 F.2d 77, 81 (D.C.Cir. 1991), cert. denied, .. (cites omitted). **In this regard**, the tax instructions and regulations represent the Department of Treasury's "**substantive regulatory choice**" and as such are exempt from OMB review." 951 F.2d at 1192, N.4. (Emphasis added.)

In reality, Dole noted that under the PRA, the "...information requests share at least one characteristic: The

information requested is provided to a federal agency, either directly or indirectly. N.4." Then Dole went on to say:

> "By contrast, disclosure rules do not result in information being made available for agency personnel to use. The **promulgation of a disclosure rule** is a **final agency action** that represents a **substantive regulatory choice.** An agency charged with protecting employees from hazardous chemicals has a variety of regulatory weapons from which to choose: It can ban ... or it can require labels ... An agency chooses to impose a warning requirement because ... least intrusive measure ... sufficiently protect the public, not because the measure is a means of acquiring information useful in performing some other agency function." 110 S.Ct., 933-934 (Emphasis added.)

The Dole quote directly above **is** 110 **S.Ct. at 933,** and is the only place in the entire decision where the phrase "substantive regulatory choice" is found. The error in citing Action Alliance is just as bad. Action Alliance said:

> "We do not believe the regulation here is "substantive" as the term is used in Steelworkers.

> [Dole] It appears both in form ... and in function considerably more like the **tax records and compliance reports** that the Court recognized as **covered** by the Paperwork Act (see **110 S.Ct. at 933** & n.4) than like the OSHA **disclosure rules** that it found **exempt.**"
> **930 F.2d at 81.** (Emphasis added)

Because the Plaintiffs in Action Alliance placed great stress on the "substantive" nature of HHS' goals, the Court further said:

> [T]he role ... is essentially the same as that of tax and other compliance records --- to bring behavior into compliance with substantive standards outside the requirement. The test is a functional one. ... Not only would such a test be extremely hard to apply, ... but it would be readily manipulated by agencies, enabling them to escape OMB review by larding their regulatory preambles with gratuitous claims of acceptable "substantive" purposes.
> 930 F.2d at 82. (Emphasis added.)

These are serious material misrepresentations of legal authorities.

To keep from ruling against the IRS, in addition to the "findings" discussed above, when the appellants, convicted of willful failure to file income tax

returns, on second appeal, raised the PRA issue because relevant regulations and instructions for tax forms did not contain required OMB control numbers, the court ignored its own prior decision (United States v. Dawes, 874 F.2d 746 (10th Cir. 1989)), when it stated that the duty to file a tax return was governed by 26 U.S.C. § 6091 and its regulations. (Remember also that 26 C.F.R. 1.6091-1, 1.6091-2, and 1.6091-4 still do not have OMB control numbers as noted above), and declared that income tax regulations "simply assist taxpayers to complete tax forms" and "are subsidiary to and mere administrative appendages of the tax form. They function only to aid the taxpayer in providing the information required by the 1040 form."

Dawes, and Respondent in this case, also maintain that "tax return

instruction booklets and IRS regulations" are not "information collection requests" within the meaning of 44 U.S.C. § 3502(11), because these items are not specifically spelled out in the statute. If this faulty logic were applied to 26 U.S.C., the Form 1040 would not exist; it is not specifically mentioned anywhere in 26 U.S.C.

After slaughtering the controlling decision of the Supreme Court and laying it aside, the Dawes court cited six district court cases and two circuit court cases which support its decision. One was United States v. Hicks, 947 F.2d 1356, 1359, (9th Cir. 1991) [hereinafter Hicks], which even though from the circuit that enforced the public protection provision of the PRA and reversed the criminal convictions of Smith and Hatch, refused to enforce it against the IRS. Hicks did refer to Dole

properly, and then immediately dismissed any relevancy to a criminal tax prosecution:

> The IRS, like any federal agency, must comply with the PRA and, in particular, must display OMB control numbers on its tax forms and on its regulations. See Dole .... (tax forms are typical of the information requests subject to the PRA.) But even assuming without deciding that the IRS failed to comply with the PRA here, its failure does not prevent Hicks from being penalized.

Hicks referred to the tax laws with remarks like "an explicit statutory requirement" and a "legislative command" of Congress, as opposed to an "administrative request", and

> PRA not meant to provide criminals with an all-purpose escape hatch. See United States v. Burdett, 768 F.Supp. 409 (E.D.N.Y.1991); see also United States v. Wunder, 919 F.2d 34, 38 (6th Cir. 1990).(Defendant was not convicted of violating a regulation but of violating a statute which required him to file an income tax return.").
>
> As for the argument of Hicks, Wunder, and others, that the PRA does not

apply to income tax because it is a statutory requirement that a taxpayer file an income tax return, the same Senate Report relied on by the Dole Court, (see 110 S.Ct. at 933, N.3.) speaks very clearly:

> The fact the collection of information is specifically **required by statute does not**, however, **relieve** an agency of the **obligation** to submit the proposed collection for [OMB approval]. S.Rep. No. 96-930, p. 49 (1980); 1980 U.S. Code Cong.& Admin.News p. 6241, at 6289. (Emphasis added.)

Hicks refers to this very report, 947 F.2d, 1359, but apparently missed the above portion.

In United States v. Kerwin, 945 F.2d 92 (5th Cir. 1991) [hereinafter Kerwin], the Fifth Circuit, citing Wunder, held that "Since Kerwin ... was convicted of that statute, [§7203] which is not an information request, there is no violation of the [PRA]. For the reasons set forth in Wunder, we AFFIRM."

In Wunder, the defendant raised the argument of ineffective assistance of counsel, part of which was his counsel's failure to raise the "implications of the [PRA]." Two of the three years involved were not subject to the provisions of the PRA (1979 and 1980). Wunder makes a "courtesy" cite to Dole, repeating verbatim the paragraph from 110 S.Ct., 933, which begins "The PRA prohibits any federal agency...."; follows it directly with 44 U.S.C. § 3512, and then notes "At least one court has reversed a criminal conviction on the basis of section 3512." citing Smith. The court then denies relevancy.

The Tax Court cited Schott v. Commissioner, T. C. Memo. 1991-457 [hereinafter Schott]. Schott notes that prior to 1990, courts held that tax forms were exempt from the PRA, but petitioner "relies on Dole ... in which the Supreme

Court, in dicta, made a general statement that some tax forms may fall under the requirements of the PRA." Schott then goes on to depend on Wunder, and a statement from Collins that exempted OMB expiration dates.

Respondent and some courts say "OMB does not have the power to overturn statutes enacted by Congress." (Appellate Br. 34.) Congress enacted the PRA, not OMB. The Public Protection provision does not overturn anything - whether statute, regulation or rule. Enforcement of it will not prevent Respondent from collecting, in a lawful manner, any taxes lawfully owed, and will not disturb the jurisdiction of the Tax Court regarding taxes.

Congress forbids, by statute, any federal agency who has not complied with the PRA to penalize anyone else in any manner (including through the Judiciary),

for refusing to comply with a statutorially invalid request. Congress did it deliberately "with malice aforethought" toward recalcitrant agencies who would ignore their Congressional mandate; it was clearly and forcefully stated from the beginning, and recognized by this Court in Dole, (110 S.Ct. at 936-937) that the measure was to force agency compliance. That should have a familiar ring to Respondent -- if one does not voluntarily comply, one gets penalized.

REASONS FOR GRANTING THE WRIT

Ferguson as an individual has been denied the basic rights of due process and equal protection under the law, guaranteed by the Constitution; denied a statutory right given her by Congress; and will suffer future deprivation of property; all resulting from the unlawful acts of Respondent, who assessed

penalties statutorially forbidden by Congress, unless Ferguson's injury is redressed by this Court with a decision favorable to Ferguson.

Ferguson's injury must be redressed by this Court because this Court is the sole arbiter over refusal of the lower courts to follow the mandatory authority and **stare decisis** established by this Court, over usurpation of legislative power by the lower courts, and over error in the lower courts. Ferguson cannot turn to the legislative branch for redress. Congress has already spoken plainly on this matter. Realizing there were those who questioned the wisdom of their mandate, Congress explicitly and specifically, statutorially denied to the courts the jurisdiction and power to do exactly what the lower courts have done in this case: enforce penalties imposed by an agency that did not comply with the

PRA.

Ferguson cannot turn to the executive branch for redress because the IRS, the Treasury Department, and the Justice Department all vehemently opposed the enactment of the Act, and sought to convince Congress to "remove the teeth" before passing the Act, but Congress said "no" just as strongly. Undaunted, all three groups have continued to frustrate implementation any way they can.

After describing a legal opinion regarding the PRA issued by the Justice Department in June of 1982 as an invalid interpretation of the law, and a "flagrant example by unelected officials in the bowels of the Federal office building to rewrite and change a law passed by Congress and signed by the President. (Congressional Record, July 1, 1982)" which serves to "distort and change the congressional intent expressed

in the Paperwork Reduction Act", (S.Rep. No. 347, 99th Cong., 2d Sess. p. 122-123 (1986), Senator Lawton Chiles, a sponsor of the PRA, went on to say, **id.** at 123, "Federal agencies will continue to try to find ways, including unfounded interpretations of what Congress intended, to limit the scope of the Paperwork Act's requirements and assurances the law is intended to provide the public."

The federal agency called the Internal Revenue Service found its way through a judiciary which was willing to violate the principle of separation of powers and judicially legislate an exception for an agency which Congress stressed was not to be exempted from the statute; a judiciary willing to enforce penalties which Congress expressly and statutorially denied the courts the jurisdiction to enforce; a judiciary

willing to ignore the mandatory authority of the Supreme Court on this very issue; a judiciary willing to commit grave error in order to deprive Ferguson of the basic rights of due process and equal protection under the law, and thereby, her right to property; and the statutory right granted her by Congress in the Public Protection provision of the PRA and recognized by this Court in its Dole decision. Our Founding Fathers added the Fifth Amendment to the Constitution not to protect criminals, but to protect the people from a criminal and/or over-zealous government.

Ferguson respectfully asks this Court to grant certiorari, but please do not remand this case to Fifth Circuit for "further consideration in light of Dole v. Steelworkers ..." because Ferguson has already placed Dole, Dawes, the PRA and its regulations, and the Legislative

history and intent of Congress, before Fifth Circuit in great detail (See Brief For Appellant, Reply Brief For Appellant, and especially appellant's Suggestion For Rehearing En Banc.) Ferguson fears Fifth Circuit may act as the Fourth Circuit did in Hutto v. Davis, 454 U.S. 370, 372 (1982).

Also, it would appear the Fifth Circuit did not look much farther than the opinion of the Tax Court regarding the rest of Ferguson's issues. Ferguson feels the courts have discriminated against her, also, as will be addressed with documentation in Brief if this Court will grant certiorari.

The decisions of the Tax Court and Fifth Circuit in this case, and Dawes, Hicks, Wunder, Kerwin, Burdett, Schott, and many others, are in direct conflict with the controlling authority of this

Court, and while most seem to have the same goal - to refuse, by whatever means, to apply the PRA to the IRS - the reasonings by which they reach this goal are numerous and divergent. This much diversity (and anarchy) among the circuits regarding the issue of the application of the Paperwork Reduction Act and its public protection provision to the statutes, regulations and instructions pertaining to the filling out and filing of federal income tax forms, makes this matter ripe for consideration by this Court.

This Court has already made a straightforward, clear analysis of the PRA, which should have been enough, but the lower courts would probably welcome a direct, blunt decision with an order that it must be followed; it could greatly lower the temperature and pressure in the judicial kitchen.

A District Judge, formerly a U.S. Attorney (so he should know the score), put it quite bluntly:

> [W]e all know that the Internal Revenue Service must chose its targets ... in light of what is current policy in administrative circles. ... No sophisticated person is unaware that ... the Internal Revenue Service has been in possession of facts with respect to public officials which it has presented or shelved in order to serve what can only be called political ends, be they high or low. And a judge who knows the score is aware that every time his decisions offend the Internal Revenue Service he is inviting a close inspection of his own returns.
>
> Lord v. Kelley, 240 F.Supp. 167 (1965).

Oh, that our judiciary would read O'Donoghue v. United States, 289 U.S. 516, 530-534 (1933), for "the benefit of the whole people."

CONCLUSION

For the reasons expressed above,

this Court should grant certiorari and hear this case.

Respectfully submitted,

Betty Ann Ferguson

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 92-4884
T.C. No. 5680-89

BETTY ANN FERGUSON,
Petitioner-Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal from the Decision of the United States District Tax Court Before SMITH, DUHE, and WIENER, Circuit Judges.

JUDGEMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATON WHEREOF, It is now here ordered and adjudged by this Court that the decision of the Tax Court in this cause is affirmed.

IT IS FURTHER ORDERED that petitioner-appellant pay to respondent-appellee the costs on appeal to be taxed by the Clerk of this Court.

June 11, 1993

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4884

BETTY ANN FERGUSON,
Petitioner-Appellant,
VERSUS
COMMISSIONER OF INTERNAL REVENUE
Respondent-Appellee.

Appeal from the Decision of the United States Tax Court (5680-89)

Before SMITH, DUHE, and WIENER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

I.

The Commissioner of Internal Revenue issued notices of deficiency to Betty Ann Ferguson for the taxable years 1981 through 1985. These notices charged Ferguson with income tax deficiencies and

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

additions to tax for failure to file returns, negligence or intentional disregard of rules and regulations, and underpayment of estimated taxes. On March 23, 1989, Ferguson petitioned the Tax Court for a redetermination.

In March 1990, Ferguson agreed to stipulate that she was liable for the tax deficiencies, the additions for failing to file returns, and the additions for underpayment of estimated taxes. The tax court then held a hearing on the neglignece issue, at which Ferguson refused to be sworn because of her religious beliefs. The Tax Court refused to allow her testimony and rendered judgment for the Commissioner.

We reversed the Tax Court and remanded for further proceedings. Ferguson v. Commissioner, 921 F.2d 588 (5th Cir. 1991). On remand, Ferguson asked to revoke her stipulation to

liability and moved for an *in camera* hearing with a sealed record prior to trial. The Tax Court denied both motions, and the case proceeded to trial on November 4, 1991. Ferguson declined to testify on Fifth Amendment grounds. The Tax Court rendered judgement in favor of the Commissioner.

II.

Appearing *pro se*, Ferguson first alleges that the trial court erred by not granting her an *in camera* hearing, prior to trial, to determine whether her testimony would incriminate her.[1] We do not think the Tax Court abused its discretion in failing to grant an *in*

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[1] At first, the Commissioner contended that Ferguson was not under criminal investigation. Later, however, Ferguson apparently discovered, through a Freedom of Information Act request, that she was under investigation. The record does not reveal whether the Commissioner deliberately misrepresented this fact.

camera hearing. In cases involving a notice of deficiency, the taxpayer has the burden of proving error in the Commissioner's findings. Welch v. Helvering, 290 U.S. 111, 115 (1933); Tweeddale (sic) [Tweedledale] v. Commissioner, 841 F.2d 643, 645 (5th Cir. 1988). Because the taxpayer initiates the proceedings and has the burden of proof, he or she may not use the Fifth Amendment as a shield to avoid meeting that burden. Tweeddale, 841 F.2d at 645.

The Tax Court found that Ferguson's claim of Fifth Amendment privilege did not merit an in camera hearing because she had not proven a reasonable fear of prosecution. We agree. Trial courts often employ in camera hearings when a witness has refused to answer a specific question and the judge feels that the question possibly could produce incriminating

testimony. Here, Ferguson never took the stand and simply alleged that she would be forced to make incriminating statements if she took the stand. Under these circumstances, an in camera hearing would have been fruitless, as the Tax Court had no way of knowing what testimony the Commissioner would attempt to elicit. In other words, any Fifth Amendment concerns were not ripe when Ferguson made her request.

We likewise reject Ferguson's suggestion that her due process rights were violated by the Tax Court's failure to conduct an in camera hearing. Ferguson alleges that she was prevented from adequately responding to the negligence charges. As we noted above, we previously have rejected such a claim in a similar proceeding. See Tweeddale, 841 F.2d at 645. The taxpayer may not use the Fifth Amendment as a shield to avoid meeting

his burden of proof. Moreover, because the Tax Court did not err in failing to grant the in camera hearing, there likewise can be no due process violation.

Ferguson also argues that the trial court erred in a pretrial proceeding by asking her whether she was currently employed and whether she had filed returns for years not at issue. She apparantly claims this violated her Fifth Amendment rights as well. Even if the Tax Court erred in asking these questions, any error was harmless, as Ferguson cannot identify anything in the Tax Court's decision that would indicate these questions affected the court's judgement in any way.

III.

Next, Ferguson argues that the Tax Court erred in denying her motion to be relieved of her stipulations. As we discussed above, the parties stipulated

to liability for past tax deficiencies as well as several additions to tax. Ferguson argues that she was coerced into these stipulations. Even if Ferguson was coerced into stipulating to liability, she did not come forward with any evidence suggesting that the stipulations were incorrect. Without eny evidence tending to disprove the truth of the stipulations, the trial court did not abuse its discretion in denying Ferguson's motion.

IV.

Finally, Ferguson argues that she cannot be penalized for the failure to file income tax returns because the instructions for the Form 1040 do not contain an Office of Management and Budget Control number as required by the Paperwork Reduction Act. Citing 44 U.S.C. §3512 (1988), Ferguson claims she cannot be subject to any penalties for

failing to provide information to the IRS.[2] We previously have held that regulations and instructions concerning the filing of income tax returns do not constitute information requests within the meaning of the act. See United States v. Kerwin, 945 F.2d 92 (5th Cir. 1991); see also United States v. Wunder, 919 F.2d 34, 38 (6th Cir. 1990); United States v. Dawes, 952 F.2d 1189 (10th Cir. 1991). Thus, we find Ferguson's claim to be without merit.

The decision of the Tax Court is AFFIRMED.

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[2] The statute provides, "Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter."

APPENDIX B

UNITED STATES TAX COURT

BETTY ANN FERGUSON,
Petitioner,
v. Docket No. 5680-89
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the opinion of the Court filed February 18, 1992, and incorporating herein the facts recited in respondent's computation as the findings of the Court, it is

ORDERED AND DECIDED: That there are deficiencies in income tax and additions to tax due from the petitioner as follows:

		Additions to Tax - I.R.C.$			
Year	Deficiency	6651 (a)(1)	6653 (a)(1)	6653 (a)(2)	6654
1981	6,033.54	1,072.10	301.68	*	$295.17
1982	6,277.46	1,132.83	313.87	*	398.65
1983	4,213.00	315.70	210.65	*	32.20
1984	5,218.00	216.50	260.90	*	-
1985	1,403.00	197.50	70.15	*	-

* The addition to tax under I.R.C. $ 6653(a)(2) is 50% of the interest payable under I.R.C. $ 6601 with respect to the portion of the underpayment which is attributable to negligence, which is

$4,288.41, $4,531.31, $1,262.79, $866.00 and $790.00 of the deficiencies for the taxable years 1981, 1982, 1983, 1984 and 1985, respectively.

(Signed) [ink stamp] Stephen J. Swift
Entered: May 26, 1992 Judge.

T.C. Memo. 1992-95

UNITED STATES TAX COURT

BETTY ANN FERGUSON, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent

Docket No.5680-89 Filed February 18, 1992

Betty Ann Ferguson, pro se.

Linda A. Neal, for respondent.

MEMORANDUM OPINION

SWIFT, Judge: Respondent determined deficiencies in petitioner's Federal income taxes and additions to tax for 1981 through 1985 as follows:

Year	Deficiency	Additions to Tax			
		§6651 (a)(1)	§6653 (a)(1)	§6653 (a)(2)	§6654
1981	$7,793	$1,512	$302	[1]	$403
1982	7,236	1,372	314	[1]	492
1983	5,277	582	211	[1]	98
1984	5,218	217	261	[1]	--
1985	1,403	198	70	[1]	--

[1] 50 percent of the interest due on the

portion of the underpayment attributable to negligence.

Unless otherwise indicated, all section references are to the Internal Revenue Code of 1954 in effect for the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

After settlement of many issues, the one issue remaining for decision is whether petitioner is liable for negligence additions to tax under section 6653(a) for 1981 through 1985.

Some of the facts have been stipulated and are so found. Petitioner lived in Metairie, Louisiana, at the time her petition was filed.

During 1981 through 1985, petitioner was employed by Oecan Drilling & Exploration Co. (ODECO). In 1981, petitioner filed with ODECO an Employee's Withholding Allowance Certificate (Form W-4) improperly claiming that she was

exempt from Federal income tax withholding.

Sometime in 1981, respondent determined that petitioner was not exempt from Federal income tax withholding and instructed ODECO to withhold tax from petitioner's income as if petitioner was a single taxpayer claiming one exemption and to continue withholding in the above manner until such time as petitioner filed with ODECO a proper Form W-4.

In 1982 and 1983, petitioner again filed with ODECO Forms W-4 improperly claiming she was exempt from Federal income tax withholding.

Petitioner did not file with respondent Federal income tax returns for any of the years in issue.

In challenging respondent's determination of the negligence additions to tax under section 6653(a), petitioner bears the burden of proof to show that

she was not negligent in filing with ODECO improper Forms W-4 in 1981, 1982, and 1983, and in failing to file Federal income tax returns for 1981 through 1985. Rule 142(a); Welch v. Helvering, 290 U.S. 111, 115 (1933).

Petitioner does not challenge respondent's determination that petitioner is liable for the negligence additions to tax under any traditional legal theory. Instead, petitioner raises various tax protester-type arguments. For example, petitioner asserts that not filing Federal income tax returns for the years in issue was the only means to preserve her privilege against self-incrimination under the Fifth Amendment to the United States Constitution.

As courts have stated numerous times, the Fifth Amendment privilege against self-incrimination does not justify refusal to file Federal income

tax returns. United States v. Sullivan, 274 U.S. 259, 263-264 (1927); United States v. Neff, 615 F.2d 1235, 1238-1239 (9th Cir. 1980); United States v. Johnson, 577 F.2d 1304, 1310 (5th Cir. 1978); Garner v. United States, 501 F.2d 228, 230 (9th Cir. 1974), affd. 424 U.S. 648 (1976). Instead, the Fifth Amendment may be asserted only in response to specific questions asked on the returns. United States v. Johnson, supra; Garner v. United States, supra.

Also, in order to assert the Fifth Amendment, a witness must be faced with a substantial danger of self-incrimination that is real and appreciable, and the witness must have reasonable cause to apprehend such danger. Steinbrecher v. Commissioner, 712 F.2d 195, 197 (5th Cir. 1983); McCoy v. Commissioner, 696 F.2d 1234, 1236 (9th Cir. 1983), affg. 76 T.C. 1027 (1981); Woods v. Commissioner, 91

T.C. 88, 90 (1988). Petitioner has not introduced any evidence that would even remotely support her assertion of the Fifth Amendment.

Petitioner also contests her liability for the negligence additions to tax on the grounds that respondent's regulations and the instructions accompanying Forms 1040 do not comply with the requirements of the Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. secs. 3501-3520 (1988). In general, the PRA requires the U.S. Office of Management and Budget (OMB) to approve information collection requests made by certain Federal agencies and requires all such approved information collection requests to display current OMB control numbers. 44 U.S.C. 3507(a),(f). If information requests fail to display the required OMB control numbers, "no person shall be subject to any penalty for

failing to maintain or provide information to any agency ***". 44 U.S.C. sec. 3512.

A number of courts, including the Tax Court, recently have addressed petitioner's argument and have held that the PRA does not apply to either Federal income tax regulations or to the instructions accompanying Federal tax forms because such documents are not information requests; rather they are designed to assist taxpayers to complete tax forms and to more easily comply with information requests. United States v. Dawes, ___F.2d___(10th Cir. Dec. 17, 1991); United States v. Hicks, 947 F.2d 1356 (9th Cir. 1991); United States v. Kerwin, 945 F.2d 92 (5th Cir. 1991); United States v. Wunder, 919 F.2d 34, 38 (6th Cir. 1990); Schott v. Commissioner, T.C. Memo. 1991-457.

Petitioner has not introduced any

evidence to justify why she filed with ODECO in 1981, 1982, and 1983 improper Forms W-4, and why she failed to file Federal income tax returns for 1981 through 1985. We sustain respondemt's determination with respect to the negligence additions to tax under section 6653(a).

Decision will be entered under Rule 155.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4884

BETTY ANN FERGUSON,
Petitioner-Appellant,

VERSUS

COMMISSIONER OF INTERNAL REVENUE
Respondent-Appellee.

Appeal fron the Decision of the United States Tax Court (5680-89)

ON SUGGESTION FOR REHEARING EN BANC

(Opinion June 11, 5 Cir., 1993, ____ F.2d _____)

(July 14, 1993)

Before SMITH, DUHE, and WIENER, Circuit Judges.

PER CURIAM:

(x) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court

having requested that the Court by polled on rehearing en banc (Federal Rules of Appellate Procefure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

(Signature of J. Smith)
United States Circuit Judge